No. [redacted] 189

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

MILTON KNAPP,

Appellant,

against

MITCHELL D. SCHWEITZER, Judge of the Court of General Sessions and FRANK S. HOGAN, District Attorney of the County of New York,

Appellees.

JURISDICTIONAL STATEMENT.

BERNARD H. FITZPATRICK,
Counsel for Appellant,
37 Wall Street,
New York 5, N. Y.

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JURISDICTIONAL STATEMENT.

Appellant appeals from a final order of the New York Court of Appeals affirming, as did the intermediate appellate court, an order of the New York Supreme Court, Special Term, New York County, denying and dismissing appellant's petition in a prerogative writ proceeding for review of (certiorari) and prohibition against a Mandate of the Court of General Sessions, New York County, imposing a fine upon appellant and committing him to jail for a criminal contempt of that court.

Opinions Below.

The New York Court of Appeals handed down no opinion but amended its remittitur to show the necessary decision of the two federal questions involved 2 N. Y. 2d . A print of the decision slip on motion to amend remittitur will be found in Appendix "A" hereto at page 43.

The New York Supreme Court, Appellate Division, First Department, per Bergan, J. rendered an opinion which is reported at 2 App. Div. 2d, 579 and 157, N. Y. Supp. 2d 158, and is printed in Appendix "A" hereto at page 35.

The New York Supreme Court, Special Term, New York County, Markowitz, J. rendered an opinion which is unreported and which is printed in Appendix "A" hereto at page 34.

The Court of General Sessions of New York County, Schweitzer, J. rendered an opinion which is not officially reported but appears at 157 N. Y. Supp. 2nd 820 and is printed in Appendix "A" hereto at page 23.

Jurisdiction.

Jurisdiction by appeal is founded upon the question of Federal preemption referred to immediately below. In addition, it is respectfully submitted, both that question and the question of self-incrimination presented by this record are sufficiently substantial and important, each in itself, to warrant grant of certiorari.*

This proceeding originated in the Court of General Sessions of New York County, which on May 22, 1956 summarily convicted the appellant, who is an employer in an industry affecting commerce, called as a witness before a Grand Jury of New York County, of a criminal contempt for his refusal to answer, in the course of an investigation under New York Penal Law, Sections 380, 580 and 850, dealing with bribery of labor union representatives, conspiracy and extortion, questions directed to the ascertainment of whether he had paid money to certain named officials of the labor union representing his employees. The

* *Cf.* "The questions are substantial", *post*, page 11.

conviction overruled a contention of the appellant made on April 30th, 1956, the first day on which a motion to punish for contempt was made, to the effect that Taft-Hartley Act, Section 302, 29 U. S. C. 186, 61 Stat. 157, authorizing certain payments by employers to union representatives and prohibiting, under penal sanction, all other such payments, preempted the field of regulation of such payments, wherefore the said state statutes as here applied, were repugnant to the cited federal statute and furnished no basis for the jurisdiction of the Court of General Sessions or its appendant Grand Jury to compel his testimony.

Review was had by petition, dated and served on the day of conviction, addressed to the New York Supreme Court, Special Term, New York County, under Article 78 of the New York Civil Practice Act, a statutory substitute for the writs of certiorari to review and prohibition. The petition asserted, *inter alia*, want of jurisdiction in the Court of General Sessions by reason of federal preemption. The petition was denied and dismissed on July 3rd, 1956. On the same day notice of appeal to the Appellate Division of the Supreme Court, First Department was served and filed. The Appellate Division affirmed on November 27th, 1956. On December 1, 1956 notice of appeal to the Court of Appeals was served and filed. The Court of Appeals affirmed by final order dated March 8th, 1957. On April 4th, 1957 it amended its remittitur to show that it had necessarily entertained the aforementioned contention of federal preemption and decided it adversely to appellant.

Notice of appeal to this Court was served and filed on May 13, 1957, with the Clerk of New York Supreme Court, New York County, that being the Court possessed of the record. As stated in the notice of appeal, appellant claims that this Court has jurisdiction by appeal under 28 U. S. C.

1257(2), the State Courts having held valid New York Penal Law Sections 380, 850 and 580 against a claim of repugnance to Taft-Hartley Act Sec. 302, 29 U. S. C. 186, 61 Stat. 157.

The jurisdiction of this Court by appeal is supported by the following cases:

Dahnke Walker Milling Co. v. *Bondurant,* 257 U. S. 282;

La Crosse Tel. Co. v. *Wisconsin Board,* 330 U. S. 18;

Bethlehem Steel Co. v. *N. Y. S. L. R. B.,* 330 U. S. 767; the amended remittitur being conclusive as to sustaining the validity of the State statutes, as applied, against a claim of repugnance;

Charleston Ass'n v. *Alderson,* 324 U. S. 182.

Questions Presented.

1. Preëmption.

Whether New York Penal Law, Sections 380, 580 and 850, dealing, respectively, with bribery of labor union representatives, conspiracy and extortion, are, as applied to payments passing between employers in industries affecting commerce and officials of labor unions representing their respective employees, repugnant to and superseded by a federal statute preempting the field of penal control of such payments, viz., Taft-Hartley Act, Section 302 (29 U. S. C. 186; 61 Stat. 157) authorizing certain payments by employers to labor union representatives and prohibiting, under penal sanction, all other such payments so as to deprive a Grand Jury of the State of jurisidiction to compel, by contempt process, testimony by an employer engaged in commerce, called as a witness, concerning pay-

ments by him to named officials of the labor union representing his employees.

2. Self Incrimination.

Whether an employer in an industry affecting commerce, called before a Grand Jury of the State as a witness in the course of an investigation concerning the state penal offenses of bribery, extortion and conspiracy connected with labor union operations, is privileged, by the Fifth Amendment to the United States Constitution, to decline to answer questions of such character that affirmative answers thereto would establish the *corpus* of the federal crime of unauthorized payment of moneys to an official of the labor union representing his employees, Taft-Hartley Act, Sec. 302 (29 U. S. C. 186; 61 Stat. 157); and whether his ensuing punishment for contempt by a State Court is not barred by the Supremacy Clause, Art. VI, Cl. 2 of the United States Constitution and also by the "Privileges and Immunities" Clause of the Fourteenth Amendment.

Statutes Involved.

Federal: Labor-Management Relations Act, 1947 (Taft-Hartley Act) Section 302, 29 U. S. C. §186, 61 Stat. §157 Constitution. Art. I, Section 8 Cl. 3 (commerce) Art. VI Cl. 2 (supremacy) Amendment V (self-incrimination) Amendment XIV, Section 1 (privilege and immunities).

New York State: Penal Law Sections 380 (bribery of union officials), 850 (Extortion); 580 (conspiracy).

The texts of the foregoing, so far as material, are set forth in Appendix B hereto.

Statement.

A. Proceedings in General Sessions.

The appellant is a co-partner of Eagle Reel and Manufacturing Company, a Bronx (118)* concern, concededly (223) engaged in interstate commerce. The manufacturing operations of Eagle Reel are organized by a labor organization known as Local 239, International Brotherhood of Teamsters of which one Philip Goldberg (sometimes referred to as "Greenberg" in the record) is an official (215).

There have existed and now exist contractual relations between the employing firm and that local union covering the wages, hours and working conditions of the employees (209-213).

The appellant on April 23, 1956 appeared before the Third April Grand Jury of New York County and was asked a series of questions designed to elicit information as to payment of monies from appellant employer to Goldberg. Appellant declined to answer on the ground that the answers might tend to incriminate him. Typical of the questions are the following which, if answered affirmatively, would establish the *corpus* of a violation of section 302 of the Labor Management Relations Act of 1947 (Taft-Hartley Act, 29 U. S. C. §186):

> "Q. Mr. Knapp, on or about October 28th, 1955, did you give Phillip Goldberg, a representative of Local No. 239, International Brotherhood of Teamsters, the sum of $500" (62)?
>
> "Q. Mr. Knapp, on or about October 28th, 1955, did you go to the Public National Bank and Trust Company at 149th Street and Prospect Avenue and

* References are to folios in the record before the Court of Appeals which is the record certified to this Court.

cash this check, Grand Jury Exhibit Number One, and receive from the bank the sum of $500" (63)?

"Q. Mr. Knapp, on October 28th, 1955, were you accompanied by Phillip Goldberg, an official of Local No. 239, International Brotherhood of Teamsters, when you went to the Public National Bank and Trust Company, located at 149th Street and Prospect Avenue" (64)?

"Q. Isn't it a fact that Sam Goldstein is an official of Local No. 239, International Brotherhood of Teamsters" (66)?

"Q. Did you ever pay or give any sum of money to Samuel Goldstein" (67)?

Thereafter the Grand Jury conferred immunity on the appellant. The same questions were again put to him and he again asserted his privilege against self-incrimination.

Appellant was resubpoenaed to appear before the Grand Jury on April 25, at which time the same questions were put to him. He continued to assert his privilege and was directed by the foreman to appear before the appellee, Honorable Mitchell D. Schweitzer, Judge of the Court of General Sessions (78-106) in Part I of that court.

There the District Attorney made application for a direction by the Court to the appellant to answer the questions put to him in the Grand Jury (77). The application was founded upon a statement by the District Attorney that "there is now pending" before the Grand Jury a John Doe investigation of conspiracy, bribery and extortion among labor officials (77). Appellee Judge Schweitzer directed appellant to return to the Grand Jury on April 27 and answer the questions over the objection that the appellant asserted his privilege in apprehension of a danger of admitting the *corpus* of a violation of the Taft-Hartley Act (138, 140):

The appellant obeyed the direction to return to the Grand Jury but continued to assert his privilege and respectfully declined to answer the same questions. Thereupon the District Attorney again procured appellant to appear on April 30th before appellee Judge Schweitzer, where the District Attorney moved the Court to punish the appellant summarily for contempt.

Counsel for the appellant thereupon, after establishing involvement in commerce (207-228), raised the issue that the Court of General Sessions had no jurisdiction of any offense involving the payment of money to a labor organization or its agents by an employer in interstate commerce, the field having been preempted by the Labor Management Relations Act, 1947 (Taft-Hartley Act, Sections 7 and 302) (226, 232-249). Judge Schweitzer adjourned the proceeding so that briefs could be exchanged on the question of Federal preemption (262).

At a continuance on May 21, 1956 counsel for appellant summarized his opposition to the District Attorney's application to punish appellant in four points (285, 286) of which two are germane on this appeal:

> "Second, the immunity conferred on the witness pursuant to Section 2447 is insufficiently broad in that it does not comprehend an immunity from prosecution under the applicable Federal statutes;"
>
> "Fourth, even if every other portion of the proceedings were proper, the respondent contends that the Court and the Third April Grand Jury has no jurisdiction of the subject matter of the investigation by reason of the preemption of the field by the Taft-Hartley act and, in particular, Sections 7 and 302 of that enactment."

The Court expressly ruled on the preemption question (289) and on the self-incrimination question (292).

On May 22 the Court adjudged appellant guilty of contempt, sentenced him to confinement in the civil prison for a period of 30 days and fined him $250.

B. Proceedings in Special Term.

Following the commitment, appellant petitioned the Supreme Court, Special Term, New York County for review (certiorari) and prohibition under Article 78 of The New York Civil Practice Act. The petition recited the partnership of appellant in the Bronx firm, the involvement of the firm in interstate commerce, the organization of the plant by Local Union 239, the official status of Greenberg (Goldberg) in the Union and the existence of collective contractual relations between the Union and the Bronx firm, the appearance of appellant as a witness before the Third April Grand Jury, the questioning of petitioner to elicit information as to payments to Greenberg, the assertion by appellant of his privilege against self-incrimination, the conferring of immunity upon appellant by the Grand Jury and petitioner's subsequent adherence to his claim of privilege, the application of the appellee District Attorney before the appellee Judge for an instruction to the appellant to answer and the direction to the appellant to answer over the following objections *inter alia*:

> (a) That the Court of General Sessions of the Peace of the City and County of New York had no jurisdiction of any offense involving the payment of money to a labor organization or its agents by an employer whose employees are engaged in interstate commerce by virtue of the Labor Management Relations Act of 1947 (Taft-Hartley Act, Sections 7 and 302);
>
> (b) That the grant of immunity pursuant to Section 2447 of the Penal Law is insufficiently broad in that it does not bar prosecution of the petitioner

for violation of Section 302 of the Labor Management Relations Act of 1947.

The petition below goes on to recite appellant's adherence to his refusal to answer, the application to punish him for contempt, the adjudication of contempt and his commitment. The petition concludes with an averment of initial application and a prayer for prohibition and review.

The amended answer apparently raised no factual issue but denied the validity of the appellant's objections to answering the questions, pleaded the legal insufficiency of the petition and prayed for denial and dismissal.

The reply set up *inter alia*, on the issue of appellant's jeopardy in respect of Federal prosecution, that the Federal Prosecutor, Paul Williams, had publicly stated his intention to cooperate with the appellee District Attorney in the investigation of labor union bribery and extortion and that said appellee intended on his part to cooperate with the Federal Prosecutor.

No triable issue of fact appeared on the hearing and the Special Term, upon the pleadings and the minutes of General Sessions dismissed the petition and denied the same. The memorandum opinion (379) adopted the reasoning of the opinion in the Court of General Sessions.

C. Proceedings in Appellate Division.

On appeal taken to the Appellate Division, First Department, a unanimous order affirming the order of the Special Term was entered on November 27th, 1956, with opinion by Bergan, J. in which all concurred. The opinion did not touch the question of federal preemption; it dealt solely with the question of self-incrimination.

D. Proceedings in Court of Appeals.

The Court of Appeals affirmed without opinion by order of March 8th, 1957. However, it indicated, by order of April 4th, 1957 amending its remittitur, that it had necessarily entertained the question of federal preemption and the question of the right, under the Fifth Amendment, of appellant to decline to answer and decided the questions adversely to appellant.

The Questions Are Substantial.

1. Preëmption.

The federal Act upon which the preemption claim is based, Section 302 of the Taft-Hartley Act, is substantively so designed that it

1. authorizes certain payments by employers in commerce to employee representatives (Sec. 302(c)).
2. prohibits all other payments by employers to employee representatives (Sec. 302(a), (b)).

Procedurally, the Act is so designed as to be enforceable by penal sanction (Sec. 302(d)) and by federal civil action (Sec. 302(e)). In addition, many infractions of the Section would also constitute the unfair labor practice of "company domination" (29 U. S. C. Sec. 158(a)(2) which would be remediable (29 U. S. C. Sec. 160) by cease and desist orders, disestablishment or other administrative measures.

The exhaustive character of this scheme is no accident. Congress, in 1947, found itself in the position that the prior Act, the Wagner Act, had (Sec. 8(2)), in seeking to prevent company domination of labor unions, drawn in question the validity of every species of financial or other support

by an employer of a union or of the objectives of a union.[1] It was then, as it still is, an unfair labor practice

> " . . . for an employer (in commerce) . . . to contribute financial or other support to (a labor organization)."

The broadness of that language, coupled with the investiture of the administering agency with a policy-making function in that regard, which, though limited, was without standards, rendered undesirably uncertain the entire subject of payments by an employer to the representatives of his employees. The uncertainties were obstacles to the achievement of certain legitimate objectives of the labor movement, including dues collection and pension and welfare benefits.

On the other hand, the unilateral character and usually mild remedies of the administrative process had been ineffective against some vicious forms of domination, such as the bribery of labor representatives, colloquially known as the "sell out", and was inadequate to check the use, by the unscrupulous, of the right to strike, guaranteed by Section 7 of the Wagner Act, as a weapon of extortion.

Congress, therefore, had the dual task of affirmatively validating, with safeguards, those payments consonant with legitimate labor objectives, notably the dues check-off and welfare funds, while placing more adequate sanctions upon domination achieved through the power of the purse especially in the form of bribery and upon the use of the federally guaranteed "right to strike" for purposes of extortion.

The result is a statute which spells out all righteous payments and spells out all wrongful payments and is remedially plenipotent. No payment in this field can pos-

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[1] *Cf.* Statement of Rep. Case, 93 Cong. Rec. 3623, Apr. 15, 1947; 1 Leg. Hist. 753.

sibly be made the rectitude of which cannot be judged by this Federal statute and every departure from rectitude can be restrained, corrected and punished by the Federal means specially provided.

It is not without importance to observe that Section 302 operates as part of a larger federal statutory scheme organically conceived[2] to regulate labor, labor organizations, individual employees and employers in their interrelations and in their relations to the general welfare. The *milieu* is entirely federal.

Arrayed against this gapless scheme of Federal policement of payments to union officials are two[3] statutes of New York State upon which the authority of its Grand Jury to enquire depends.[5] One of these, the extortion statute,[4] is a statute of general application. The *gravamen* is the obtaining of property by "wrongful" use of force or fear or under color of "official right."

The other state statute[6] is oriented toward labor relations as such. Employers are forbidden to pay "duly appointed representatives" of labor organizations, and the representatives are forbidden to receive payment with the design that any official conduct of the representative, including expressly the calling or prevention of a strike, shall be influenced by the payment. Neither state statute contains a catalogue of payments which may rightfully be made.

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[2] *Cf.* 29 U. S. C. 141(b), declaring the policies of L. M. R. A.

[3] The third state statute involved, Section 580, Penal Law, the conspiracy count, draws whatever application it has to this case from the bribery statute, P. L. Section 380, or the extortion statute, P. L. Section 850. Hence it is not separately considered.

[4] Penal Law Section 850, Appendix "B", page 49, *post*.

[5] *Cf.* "Decision Amending Remittitur", Question 2, Appendix "A", page 44 *post*.

[6] Penal Law Section 380, Appendix "B", page 48, *post*.

It is immediately apparent that if either of these state statutes be applied to payments passing between employers and representatives involved in commerce, the State is stepping into a field the rights and wrongs of which are completely established by Section 302 of L. M. R. A. Congress has already said what is right, and all that is right, and affirmatively permitted it; it has also said what is wrong, and all that is wrong, and proscribed it. What room does such an all-inclusive substantive enactment leave for pronouncement by the states of standards of conduct based either on identical or different criteria?

Nor is the face of Section 302 the only matter of federal law to be taken into account in appraising the question of preemption: that Section is dovetailed into the complete scheme of regulation of labor relations, which, save for a few small islands, is the *mare nostrum* of the general government. The federal interest in the labor relations field is dominant.[1] Regulation of the field of payments to employee representatives is merely one facet of the underlying general policy of encouraging collective bargaining through representatives free of the trammels of employers; a policy implicit in the terms "self-organization" and "representatives of their own choosing".[2] Indeed, it is difficult to see how a state court could charge its jury on a count of bribery or extortion involving labor representatives unless, as the California court did in the *Garmon* case,[3] it were to " 'apply' or in some sense follow" federal law. The identity and status of representatives are

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[1] Dominance of the federal interest in the field of legislation has been recognized as a ground of preemption. *Commonwealth* v. *Nelson*, 350 U. S. 497.

[2] 29 U. S. C. 151, 157.

[3] *San Diego B. T. Council* v. *J. S. Garmon Co.*, No. 50 Oct. Term 1956, March 25, 1957.

determinable federally,[1] as is the scope of organization.[2] Strike objectives and motivation, as distinguished from methodology, are matters of federal law.[3] "Grievance time" payments, though not specifically exempt under Section 302 are justifiable under Section 8(a)(2) of NLRA (29 USC 158(a)(2)). Verily, Section 302 is but a single thread in the web of labor relations law, and that web is seamless and it is federal.[4]

What was said in the *Guss* case[5] of another, but related, segment of the national labor policy may be said here:

> "The National Act expressly deals with the conduct . . . which was the basis of the state tribunals' actions."

And it may not be said here, as in *Laburnum*[6] that Congress has left open a remedial aspect of the conduct, for here the National Act imposes the same sort of penal sanction as do the state statutes.

While the preservation of the "traditional police powers of the states" is a *desideratum*, we do not have here the question of whether the area should be policed as is the case when both legislatures are trying to regulate different fields and collide only incidentally. Here both legislatures seek to regulate identical conduct; the question is whether one hamlet shall have two autonomous police departments. Unlike the California statute involved in the *Zook*[7] case,

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[1] 29 U. S. C. 159 (a), (c).

[2] 29 U. S. C. 159 (b).

[3] *U. A. W.* v. *O'Brien*, 339 U. S. 454.

[4] *Cf. Textile Workers Union* v. *Lincoln Mills*, No. 211, Oct. Term 1956, Sec. June 3, 1957, for a case extending the scope of federal concern to embrace substantive contract law.

[5] *Guss* v. *Utah L. R. B.*, No. 280, Oct. Term 1956; March 25, 1957.

[6] *United Construction Workers* v. *Laburnum Constr. Corp.*, 347 U. S. 656.

[7] *California* v. *Zook*, 336 U. S. 730.

the New York statutes here involved permit, to continue the metaphor, each police department independently to operate its own traffic control system on the same highway. In *Zook* the federal elements of the offense were determinable by the proper federal administrative body.

When two legislative bodies attempt to regulate the substance of so narrow a field as that of payments between employers and employees' representatives it is but a short step from concurrence to conflict. There is a paucity of decisions under these particular New York statutes which prevents counsel from showing actual variations of New York cases from the policy of the federal statute, nevertheless, the seeds of conflict are present, and no great imagination is required to see how easily fact situations might fertilize them. Suppose the witness in the case at bar, asked whether he had paid Goldberg, were to respond:

> "Yes, he said the union would strike unless I made a donation to the welfare fund, so I gave him $500 in cash."

Neither New York statute exempts welfare funds. Does the New York court then proceed to punish for what may possibly be a valid federal purpose? Or does it examine the federal statute, determine that the ambiguous phrase "such payments" in Section 302(c)(5)(B) refers to certainty of contribution rate rather than to certainty of benefits—and convict?

Or, to cull from the newspapers a publicized practical example,[1] would New York under the narrow philosophy of its Penal Law convict Mr. Dubinsky for accepting the contribution to his welfare fund made by a manufacturer in order to maintain competitive parity of labor costs between his low rate non-unionizable Southern plant and his New

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[1] The incident is described in an article in The New York Times reproduced in this record at page 113.

York plant operated at union wage scales? Under the broader outlook of LMRA, the payment, though possibly within the technical prohibition of Section 302, might be a "protected activity" because it accomplishes an objective sought by the basic policies of NLRA—the "stabilization of competitive wage rates and working conditions within and between industries".[1] The New York statutes are pregnant with conflict.

It is submitted that a substantial question, hitherto undetermined by this Court, drawing in question the validity, as applied, of New York Penal Law Sections 380, 580 and 850 on the ground that they are repugnant to Taft-Hartley Act Section 302 and the Commerce clause of the Constitution, exists: that notice of appeal, setting forth that question has been served and filed within the 90 days succeeding March 8th, the date of the order of the State Court of last resort, and that appeal, therefore, lies.

Apart from the substantiality of the question, reasons for review exist. There appears to be a conflict, at least in principle, on the question of preemption between the decision of the New York Court of Appeals in the instant case and the decision of the highest court of Utah. *Utah* v. *Montgomery Ward & Co.* (1951), 120 Utah 294, 233 Pac. 2nd 685.

The Supreme Court of Utah had held a statute of that state, making it a crime for an employer to decline to honor a checkoff assignment made by an employee in favor of a labor union, repugnant to Section 302 of the Taft-Hartley Act. Although the express reasoning of the *Montgomery Ward* opinion rests upon the rather narrow "checkoff" provision of Section 302(c), it would seem that, the entire subject of payments to representatives, being regulated to

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[1] 29 U. S. C. Sec. 151. For a similar subordination of the language of the Act to its basic policies *cf. Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270.

the point of exhaustion by Section 302, it is necessarily embraced within the reasoning and a conflict in principle exists. The denial of certiorari by this Court in the *Montgomery Ward* case[1] affords no basis for resolution of the conflict.

A resolution of this question of preemption is important to the administration of the laws of many states. Four states have bribery statutes specifically relating to labor representatives.[2] Twenty-five states have statutes governing in various ways, the "checkoff".[3] It may be assumed that all states prohibit extortion, although whether the strike weapon is regarded as a means of extortion in all states is necessarily not precisely determinable.

It is respectfully submitted that the preemption question is substantial. It is further submitted that, even if the question were not appealable, it has an importance sufficient to warrant grant of certiorari.

2. Self-Incrimination

Appellant is required, under criminal penalty, by the courts of New York, to confess to having committed the *corpus* of a Federal crime, or to deny the same. Although the New York State Constitution prohibits compulsory self-incrimination, the Court of Appeals has denied him its protection and he is concluded on that issue. Hence he is here in naked reliance upon the Fifth Amendment to the Federal Constitution, maintaining that by its terms he may not be compelled in any tribunal—even that of a state—to confess a federally cognizable crime.

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[1] 342 U. S. 689.

[2] 4 CCH Labor Law Reporter ¶40355 pp. 40332, 3.

[3] 4 CCH Labor Law Reporter ¶40355 pp. 40354, 5.

It may be said, even in the face of *dictâ* in *Jack* v. *Kansas*[1] that the question is one of first impression. Nor did the *Feldman* case[2], wherein testimony given under state immunity was held usable in a federal prosecution, involve the question, for there was in that case no timely assertion of federal privilege. The appellant's contention here is not the contention raised and disposed of in the *Twining*[3] and *Adamson*[4] cases that the prohibition of the Fifth Amendment is, by the implications of the Fourteenth, controlling on the state in the administration of state law. Whatever be the merits of those cases they are not in issue here.

Here the contention is that by direct force of the Fifth Amendment, no citizen may be compelled to incriminate himself of federally cognizable crime in any tribunal—be it state or federal. He would have the Court read the amendment thus

> "No person • • • shall be compelled in any [federal] criminal case to be a witness against himself."

Thus read,[5] the Amendment is a guaranty to him of safety against federal prosecution inspired by or based upon testimony wrung from him by compulsion. The limitation

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[1] 199 U. S. 372. The state court had limited the scope of inquiry to intrastate transactions; it is difficult to see that any federal question was presented by the record. The dicta were, however, reiterated in other cases decided on the "dual sovereignty" theory, none of which involved a state inquiry. The *Jack* case is the only case in this Court involving the point. cf. J. A. C. Grant: "Immunity from Compulsory Self Incrimination in a Federal System of Government", 9 Temple L. Q. 57, 68.

[2] *Feldman* v. *U. S.*, 322 U. S. 487.

[3] *Twining* v. *New Jersey*, 211 U. S. 78.

[4] *Adamson* v. *California*, 332 U. S. 46.

[5] *Barron* v. *Baltimore*, 7 Pet. 243. The other safeguards of the Fifth Amendment are likewise so limited; grand jury, double jeopardy, due process (until the adoption of the Fourteenth).

is a limitation upon the action of the prosecuting arm of the federal government. This is the clear import of the immunity cases,[1] of the pardon cases,[2] of the statute of limitation cases[3] and of the *autrefois* adjudication cases.[4] Where the prosecution is completely barred, the privilege dies; where it is not the privilege lives.[5] The privilege does not exist where the danger apprehended is not a danger of prosecution.[6]

Around the fundamentals of the privilege there has grown up—with sound reason and with legislative as well as judicial aproval—the ancillary right of declining to testify in any inquisition, whether or not the witness be under indictment or presentment, or whatever be the purpose of the inquisition. This ancillary right exists not because there is any danger to the witness in the inquisition, but because the prosecuting arm of the federal government might be bestirred by the revelations made in the course of the inquisition. The law fears the creation of a tandem between inquisitor and prosecutor whereby a person under compulsion may be forced to feed the prosecutor to his own damnation.

The right to decline to answer before a purely inquisitorial body such as a Congressional committee is merely ancillary to the right to avoid federal prosecution springing from one's own testimony. A Congressional committee is limited in its inquiry not because it is a federal agency but because its compulsion might aid or inspire the action of a

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[1] *Counselman* v. *Hitchcock*, 142 U. S. 547.

[2] *Brown* v. *Walker*, 161 U. S. 591.

[3] *People* v. *Cahill*, 126 App. Div. 391, aff'd 193 N. Y. 232.

[4] *Lathrop* v. *Roberts*, 16 Colo. 250, 27 Pac. 698.

[5] *Counselman* v. *Hitchcock*, *supra*; *Burdick* v. *U. S.*, 236 U. S. 79; *Ex parte Irvine* 74 Fed. 954.

[6] *Ullmann* v. *U. S.*, 350 U. S. 422.

federal prosecuting agency. The right arising from the Fifth Amendment is primarily a right to avoid prosecution or conviction and only secondarily a right to decline to testify.

Thus when it is said that the Fifth Amendment is a limitation upon the operations of the federal government and not a limitation upon the states, what is meant is that the primary right—the right to avoid prosecution or conviction—is a right to avoid federal prosecution or federal conviction; and conversely, that the Fifth Amendment is not designed as a protection against state prosecution or state conviction.[1] The statement has no relation to the ancillary right of refusal to testify or to the tribunal in which the ancillary right is asserted.

The question then becomes: May a citizen, possessed of a right to avoid a federal prosecution to which there is ancillary a right to decline to testify, be deprived of that ancillary right by a state? Stated in another way: May a state make itself part of a tandem whereby a federal prosecutor may convict through state testimonial compulsion?

It is respectfully submitted that these queries must be answered in the negative. The ancillary right to decline testimony is as federal in origin as the primary right from which it springs—the right to avoid federal prosecution. As a right originating in a federal constitutional immunity, it is part of the supreme law of the land and is binding upon the states.[2]

Moreover, since the privilege and the immunity spring from the Federal Constitution, they are privileges and

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[1] Though federal tribunals recognize a claim of self-incrimination where danger of state prosecution is apprehended, the recognition is not placed upon the footing of the Fifth Amendment. *cf. U. S.* v. *Saline Bank* 1 Pet. 100; *Ballman* v. *Fagin* 200 U. S. 186.

[2] Cf. *Adams* v. *Maryland*, 347 U. S. 179 for a case applying the supremacy clause in testimonial matters; a federal statute barring use of testimony in "any court", held to bind state courts.

immunities attaching to appellant in his capacity as a citizen of the United States. Hence, by the Fourteenth Amendment they may not be abridged by the states. While the tenor of prior decisions is to the effect that the Fourteenth Amendment is not a mandate on the states to observe the provisions of the Fifth Amendment in respect of self incrimination, the case at bar involves a right of that limited class arising

> "... out of the nature and essential character of the federal government and granted or secured by the Constitution."[1]

The question presented is not only substantial; it is obviously important to the administration of justice by the states.[2] The increasing complexity of modern life is bringing about more and more federal legislation dealing with subjects on which there is state legislation; the areas of contiguity are constantly expanding. The problem posed by this case will be an oft-recurring problem.

Dated June 6, 1957.

Respectfully submitted

BERNARD H. FITZPATRICK
Counsel for Appellant
37 Wall Street
New York 5, N. Y.

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[1] *Duncan* v. *Missouri*, 152 U. S. 382; *Slaughterhouse Cases*, 16 Wall. 36.

[2] The National Association of Attorneys-General in September 1955, by vote of 23 to 14 passed a resolution calling for the enactment of a federal act permitting states to grant immunity against federal prosecution in cases involving subversion, complaining that, in practice, the federal danger made witnesses reluctant. N. Y. Times 9/18/55 p. 19: 2-3. Although the field of subversion has been declared preempted, obviously the condition is operative in other fields.

APPENDIX A.

Opinions Below

Opinion of Schweitzer, J.

COURT OF GENERAL SESSIONS.

(157 N. Y. S. app. 2d 820 sub nom. People *v.* Knapp).

[Same Title.]

Schweitzer, J.:

This is an application by the District Attorney pursuant to the Judiciary Law (§§750, 751) to have the respondent Milton Knapp adjudged in Contempt of Court for refusing to answer certain questions asked of him upon his appearance as a witness before the Third April, 1956 Grand Jury of this Court.

Among the proceedings pending before that Grand Jury was one entitled "People against John Doe, et al.", an inquiry designed to determine whether the crimes of Conspiracy (Penal Law, §580), Bribery of Labor Representatives (Penal Law, §380) and Extortion (Penal Law, §850) were being committed or had been committed in this county. In the course of that inquiry, Milton Knapp, one of two partners conducting business as Eagle Reel & Manufacturing Co., was subpoenaed to appear before the Grand Jury and to produce certain books and records. He appeared before the Grand Jury on April 23rd, 1956, was duly sworn and was asked the following question:

> "Q. Now, who represented the union in these negotiations leading to a salary increase?"

The witness refused to answer that question, stating that he did so on the advice of his lawyer and on the ground that it might tend to incriminate him.

The Grand Jury thereupon voted to grant the witness immunity, in accordance with the provisions of section 2447 of the Penal Law, and at the express request of the District Attorney, the foreman of the Grand Jury directed the witness to answer the question. The witness, however, again refused to answer on the same ground of possible self-incrimination.

Two days later, on April 25th, 1956, the witness reappeared before the Grand Jury and while under oath, was asked a series of questions, each of which he refused to answer on the ground of possible self-incrimination, notwithstanding that the foreman of the Grand Jury, at the District Attorney's request, directed the witness to answer each question, thereby assuring him of the immunity provided for by section 2447 of the Penal Law.

The questions thus put to the witness, which he refused to answer, were as follows:

> "Q. Mr. Knapp, do you know a man named Philip Goldberg?
>
> Q. Mr. Knapp, do you know whether Philip Goldberg is an official of Local No. 239, International Brotherhood of Teamsters?
>
> Q. Mr. Knapp, on or about October 28, 1955, did you give Philip Goldberg, a representative of Local No. 239, International Brotherhood of Teamsters, the sum of $500.00?
>
> Q. Mr. Knapp, I show you this check marked Grand Jury Exhibit one of today's date in the sum of $500.00 and ask whether you recognize it.
>
> Q. Mr. Knapp, on or about October 28, 1955, did you go to the Public National Bank & Trust Company at 149th Street and Prospect Avenue and cash this check, Grand Jury Exhibit No. one, and receive from the bank the sum of $500.00?
>
> Q. Mr. Knapp, on October 28, 1955, were you accompanied by Philip Goldberg, an official of Local No. 239, International Brotherhood of Teamsters, when you went to the Public National Bank & Trust

Company located at 149th Street and Prospect Avenue?

Q. Mr. Knapp, I again show you Grand Jury Exhibit No. one of today's date and ask whether your handwriting appears on the face of that check?

Q. Mr. Knapp, I show you a stub book that appears to be a check stub book, and I ask you to examine this check stub book and tell me whether your handwriting appears on the space assigned to No. 2908, that is, the box?

Q. Mr. Knapp, I direct your attention to the box No. 2908, and I ask you to tell the Grand Jury what initial appears before the name, Goldberg?

Q. Mr. Knapp, I ask whether Grand Jury Exhibit No. two of today's date is in fact a stub book used by the Eagle Reel and Manufacturing Co.?

Q. Mr Knapp, when was the last time you spoke to Philip Goldberg?

Q. Do you know a man named Sam Goldstein?

Q. Isn't it a fact that Sam Goldstein is an official of Local No. 239, International Brotherhood of Teamsters?

Q. Did you ever pay or give any sum of money to Sam Goldstein?

The District Attorney and the foreman thereupon applied to this Court to direct the witness to answer the foregoing questions. Following a hearing at which the witness was represented by counsel, this Court ruled that the questions were proper in every respect and directed the witness to return to the Grand Jury room and to answer each of the questions.

On April 27th, 1956, the witness reappeared before the Grand Jury, each of the questions was again read to him, and he persisted in his refusal to answer each of those questions on the same stated ground of possible self-incrimination.

Thereupon, on April 30th, 1956, the present application was made to this Court for an order adjudging the witness, Milton Knapp, in Contempt of Court. A further hearing was held at which the witness was again represented by counsel. At this hearing, the witness raised the objection that the entire investigation by the Grand Jury was beyond its jurisdiction, the claim advanced being that the business in which the witness was engaged was an industry affecting interstate commerce, and that section 302 of the federal Labor Management Relations Act, 1947 (the so-called Taft-Hartley Act), 29 U. S. C. §186, had completely pre-empted the subject matter of payments made by an employer to a representative of employees in any industry affecting interstate commerce, and thereby rendered inoperative any state legislation on the same subject matter.

Section 380 of the Penal Law is entitled "Bribery of Labor Representatives", and makes it a misdemeanor for any duly appointed representative of a labor organization to solicit, accept or agree to accept a bribe from any person for the purpose of influencing his "acts, decisions, or other duties as such representative" or for the purpose of inducing him to refrain from causing or preventing "a strike or work stoppage or any form of injury to any business"; and it also makes guilty of a misdemeanor any person who gives or offers a bribe to such a representative for any such purpose. (See *People* v. *Cilento*, 1 A. D. 2d 206, 207, 208.)

Section 302 of the Taft-Hartley Act (29 U. S. C. §186), on which respondent witness here relies, makes it a misdemeanor, subject to certain stated exceptions, for an employer "to pay or deliver, or agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce", and likewise makes it a misdemeanor for any such representative "to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value". The section has been interpreted by the United States Supreme Court as creating a criminal offense of the nature of *malum prohibitum*, and as outlawing "all payments, with

stated exceptions, between employer and representative" (*United States* v. *Ryan*, 76 S. Ct. 400).

It has long been settled that "the same act might, as to its character and tendencies, and the consequences it involved, constitute an offense against both the State and Federal governments and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each" (*California* v. *Zook*, 336 U. S. 725, 731, quoting from *United States* v. *Marigold*, 9 How. 560, 569; and other cases there cited).

The question, in essence, where the federal government has legislated on a subject within its jurisdiction and there is also state legislation affecting the same subject, is whether Congress intended to make its jurisdiction exclusive, thereby displacing the state statutes. It is established that "normally congressional purpose to displace local laws must be clearly manifested" (*California* v. *Zook*, *supra*, 336 U. S. at 733, and cases there cited). And where the claim is that the state legislation conflicts with the federal enactment, "it must be clear that the federal provisions are inconsistent with those of the state to justify the thwarting of state regulation" (*Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148, 156).

One of the factors which has been given great weight in determining that Congressional action was not intended to override state legislation in the same area, has been that the state laws, if that be the case, are aimed at evils within the scope of the state's traditional police powers. Thus, in *Fox* v. *Ohio*, 5 How. 410, it was held that the act of passing counterfeit money, though a crime under the federal Criminal Code, could also be punished by the state as the perpetration of a fraud on the person to whom the spurious money was passed (see *Commonwealth of Pennsylvania* v. *Nelson*, 76 S. Ct. 477, 479, decided April 2nd, 1956). And in *Gilbert* v. *Minnesota*, 254 U. S. 325, a state enactment which prescribed interference with, or discouragement of, the enlistment of men in the military or naval service of the United States or of the state, was upheld as a valid "local

police measure", notwithstanding existing federal legislation on the same subject (see *Commonwealth of Pennsylvania* v. *Nelson, supra,* 76 S. Ct. at 479).

It has similarly been observed that the punishment of such acts as extortion, fraud and violence, among others, is within the ambit of the state's "usual police powers", which will not be deemed displaced by regulatory federal legislation in the field in which such acts are committed, in the absence of an express manifestation of such a Congressional purpose (see *California* v. *Zook, supra,* 336 U. S. at 732, 734-5).

"It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested." (*Reid* v. *Colorado,* 187 U. S. 137, 148; see *Kelly* v. *Washington,* 302 U. S. 1. 11).

Extortion (Penal Law, §850 *et seq.*) and bribery in connection with labor relations (Penal Law, §380) have long been the subject of regulation in this state. They are certainly within the ambit of the historic and traditional police power of the state. There is nothing in the language of the federal statute here involved or in its legislative history to suggest that Congress intended to foreclose the states from continuing to protect their inhabitants from such evils. On the contrary, such sources of Congressional intent as are available indicate that Congress did not propose to invalidate existing state legislation on such subjects or to preclude state action with regard thereto.

Respondent relies on a series of Supreme Court decisions in the field of labor relations which have held that the broad powers conferred upon the National Labor Relations Board by the Taft-Hartley Act for the regulation of unfair labor practices, operate to preclude the states from exercising jurisdiction over such practices, either in the administrative or in the judicial sphere, where the acts complained of do not reach the stage of violence or unlawful coercion (*Garner* v. *Teamsters, Chauffeurs & Helpers, etc.,* 346 U. S. 485;

Weber v. *Anheuser-Busch, Inc.*, 348 U. S. 468; *United Mine Workers* v. *Arkansas Oak Flooring Co.*, ___ U. S. ___, 24 L. W. 4197, decided April 23rd, 1956). In *Garner* v. *Teamsters, Chauffeurs & Helpers, etc., supra,* the Supreme Court, however, emphasized (346 U. S. at 488):

> "The national Labor Management Relations Act, as we have before pointed out, leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible.
>
> This is not an instance of injurious conduct which the National Labor Relations Board is without express power to prevent and which therefore either is 'governable by the State or it is entirely ungoverned.' In such cases we have declined to find an implied exclusion of state powers. *International Union* v. *Wisconsin Board*, 336 U. S. 245, 254. Nor is this a case of mass picketing, threatening of employees, obstructing streets and highways, or picketing homes. *We have held that the state still may exercise 'its historic powers over such traditionally local matters as public safety and order and the use of streets and highways'. Allen-Bradley Local* v. *Wisconsin Board*, 315 U. S. 740, 749." (Emphasis supplied.)

The Supreme Court has thus held that applicable state remedies were not superseded by the jurisdiction reposed in the National Labor Relations Board, where the acts in question involved mass picketing, threats of violence and obstruction of public ways (*Allen-Bradley Local* v. *Wisconsin Board*, 315 U. S. 740) or constituted unlawful coercive tactics (*Auto. Workers* v. *Wis. Board*, 336 U. S. 245). In the latter case, the Court declared (336 U. S. at 252-253):

> "Congress has not seen fit in either of these Acts [the Taft-Hartley Act and the earlier Wagner Act] to declare either a general policy or to state

> specific rules as to their effects on state regulation of various phases of labor relations over which the several states traditionally have exercised control. • • • However, as to coercive tactics in labor controversies, we have said of the National Labor Relations Act what is equally true of the Labor Management Relations Act of 1947, that 'Congress designedly left open an area for state control' and that the 'intention of Congress to exclude States from exercising their police power must be clearly manifested.' *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, 750, 749. • • •"

Similarly, in *United Workers* v. *Laburnum Corp.*, 347 U. S. 656, it was held that the Taft-Hartley Act did not preclude the maintenance of a common law tort action in a state court for damages based upon tortious conduct of certain labor organizations, involving threats of violence and intimidation, notwithstanding that such acts also constituted unfair labor practices as defined by the federal statute. In its opinion in that case, the Court quoted from the Senate Report (No. 105, 80th Cong., 1st Sess. 50) preceding the adoption of the Taft-Hartley Act, as indicative of the design of that Act not to supersede state regulation where the acts to be regulated by the federal Act were also "illegal under State law" (347 U. S. at 668). The Court also quoted from a statement made by Senator Taft on the floor of the Senate that "There is no reason in the world why there should not be two remedies for an act of that kind" (347 U. S. at 668-9).

There is no claim or suggestion that the acts here under investigation by the Grand Jury constitute "unfair labor practices" subject to the exclusive jurisdiction of the National Labor Relations Board. Decisions such as *Garner* v. *Teamsters, Chauffeurs & Helpers, etc.* and *Weber* v. *Anheuser-Busch, Inc.*, *supra*, are therefore inapplicable. Rather, the situation here presented is more closely

analogous to the other cases noted above, in which the Supreme Court held that acts of violence, intimidation, disorder and tortious injury remain subject to state regulation for the safeguarding of local interests, notwithstanding the enactment of the Taft-Hartley Act.

Respondent also cites the recent decision of the Supreme Court in *Commonwealth of Pennsylvania* v. *Nelson*, *supra*, 76 S. Ct. 477, where a Pennsylvania sedition statute was held to have been superseded by the federal anti-sedition legislation. In reaching that conclusion, however, the Court emphasized that the federal legislation touched "a field in which the federal interest is so dominant that the federal system must be assumed to preclude enforcement of state laws on the same subject" (p. 481), and that the "enforcement of state sedition acts presents a serious danger of conflict with the administration of the federal program" (p. 482). The Court further pointed out that sedition was "not a local offense" but rather "a crime against the Nation" (p. 482). It is significant that the Court further noted the limits of its decision in the following words (p. 479):

> "Neither does it limit the right of the State to protect itself at any time against sabotage or attempted violence of all kinds. Nor does it prevent the State from prosecuting where the same act constitutes both a federal offense and a state offense under the police power • • •."

In the present case there is no doubt that the crimes of Bribery of Labor Representatives, Extortion and Conspiracy, which are the subject of the pending Grand Jury investigation, constitute local offenses within the reach of the state's traditional police powers. The mere fact that section 302 of the Taft-Hartley Act in a measure parallels the state statute governing one of these crimes, i.e., that of Bribery of Labor Representatives (Penal Law, §380), does not operate to invalidate the state enactment (*California* v. *Zook*, *supra*, 336 U. S. at 730). The pertinent decisions

make it clear that Congress will not be taken to have intended to debar the state from safeguarding its citizenry from pernicious evils of this kind. No conflict has been shown to exist, or is to be found, between the local statutes here involved and either the terms or the policy of the federal legislation. There is consequently no basis for holding that the state is without jurisdiction of these offenses, or that the Grand Jury lacks the power to conduct an investigation in relation thereto.

As a further justification for his refusal to answer the questions asked by the Grand Jury, respondent urges the fact that he has not been granted immunity thereby from possible Federal prosecution.

In this connection, it need only be observed that the immunity granted respondent (Penal Law, §2447) was the maximum which could be granted by this State (*People* v. *Breslin*, 306 N. Y. 294, *cert.* denied, 347 U. S. 1014). Consequently, the requirements of both the State and Federal Constitutions have been satisfied [*Brown* v. *Walker*, 161 U. S. 591; *Jack* v. *Kansas*, 194 U. S. 372; *Feldman* v. *U. S.*, 322 U. S. 487, 493; *People* v. *Breslin*, *supra*; *Dunham* v. *Ottinger*, 243 N. Y. 423, 438; *Matter of Herlands (Carchietta)*, 204 Misc. 373].

Respondent finally contends that this Court may not punish him summarily, since the Grand Jury is not in the immediate view and presence thereof, and that the proceedings must be initiated by an order to show cause.

In answering this contention, we need not consider whether the original refusal to answer the questions put by Grand Jury was a contempt committed in the constructive presence of this Court, since this Court heard sworn testimony by the Grand Jury stenographer both as to this original refusal and as to the subsequent refusal after a specific direction by this Court. Furthermore, respondent, in open court, has stated his refusal to answer the questions, thereby reaffirming the position taken before the Grand Jury. Under the circumstances, respondent's contempt was committed in the view and presence of this

Court (*People ex rel. Hackley* v. *Kelly*, 24 N. Y. 74). No further proof is necessary (*Douglas* v. *Adel*, 269 N. Y. 144, 146-7).

Even were it otherwise, it would be an idle gesture to serve respondent with an order to show cause. Respondent has been fully advised of the specifications upon which this application is based and has been represented by counsel at all stages of the proceedings herein. Respondent and counsel have appeared in this proceeding on five different days, over the period of a month. There have been hearings, at which respondent vigorously urged defenses of law, and made no attempt to controvert any of the material facts herein. Briefs have been submitted by both parties. Consequently, the statutory requirements (Judiciary Law, §751) applicable to criminal contempts not committed in the view and presence of the court have been satisfied (*Spector* v. *Allen*, 281 N. Y. 251).

It is therefore my conclusion that respondent witness was not justified in refusing to answer the questions put to him, and that the application to punish him for contempt must be granted.

I sentence the defendant to the term of thirty (30) days in Civil Prison and fine him the sum of Two Hundred and Fifty Dollars ($250).

/s/ MITCHELL D. SCHWEITZER
Judge, Court of General Sessions.

Dated New York,
May 22, 1956.

Opinion of Markowitz, J.

SUPREME COURT,

SPECIAL TERM, NEW YORK COUNTY.

(N. Y. L. J., June 28, 1956, pg. 1, Col. 6.)

Knapp *v.* Schweitzer—This is an application, pursuant to article 78 of the Civil Practice Act, wherein petitioner seeks a review of the judgment of the Court of General Sessions, New York County, which held him in contempt of court pursuant to sections 750 and 751 of the Judiciary Law. Petitioner was sentenced to thirty days' imprisonment in the civil jail and to pay a fine of $250. The contempt adjudication is predicated upon petitioner's repeated refusal to answer certain questions asked of him, before the Third April Grand Jury of this county. Petitioner had been accorded immunity pursuant to Penal Law section 2447, and directed to answer by the said court. While the instant application is made under article 78 of the Civil Practice Act, by express statutory provision (Judiciary Law, section 752), petitioner also seeks relief in the nature of prohibition against both the judge (Schweitzer, J.) who committed him, and the District Attorney of New York County to prohibit any further proceedings in respect to the refusal to answer the questions put to him. The contentions of the relator were adequately and completely answered in the learned opinion of Judge Mitchell D. Schweitzer. The application is without merit. Accordingly, the petition is denied in all respects and is dismissed. Settle order.

Opinion.

SUPREME COURT,

APPELLATE DIVISION—FIRST DEPARTMENT.

September 1956.

BERNARD BOTEIN, J. P.,
BENJAMIN J. RABIN,
JOSEPH A. COX,
MARTIN M. FRANK,
FRANCIS BERGAN, JJ.

[SAME TITLE.]

Appeal from order of the Supreme Court at Special Term (Markowitz, J.) entered July 3, 1956 in the New York County Clerk's office dismissing petition to review judgment of the Court of General Sessions, New York County, adjudging petitioner in contempt, sentencing him to jail and payment of fine, for failure to answer questions before Grand Jury on assertion of claim of privilege against self incrimination.

BERNARD H. FITZPATRICK, of counsel (WILLIAM J. KEATING with him on the brief; WILLIAM J. KEATING and BUTLER, BENNETT & FITZPATRICK, attorneys) for Appellant.

ALBERT P. LOENING, JR., Assistant District Attorney, of counsel (CHARLES W. MANNING, Assistant District Attorney, with him on the brief; FRANK S. HOGAN, District Attorney, attorney) for Respondents.

BERGAN, J.:

Petitioner, Milton Knapp, has been committed for contempt by the Court of General Sessions for failure to answer questions before the New York County Grand Jury.

He is a co-partner of Eagle Reel and Manufacturing Co., which is engaged in interstate commerce. The employees of the firm are organized by Local 239 of the International Brotherhood of Teamsters.

The subject on which the Grand Jury inquiry was being prosecuted and in which the testimony of petitioner was sought to be elicited was whether the crime of bribing labor representatives, under Penal Law, §380; of conspiracy, under §580; and of extortion, under §850, had been committed.

When called before the Grand Jury on April 23, 1956, petitioner asserted his privilege against self-incrimination. This privilege is preserved by the New York Constitution (Article I, §6). He was required, nevertheless by the Grand Jury on a later date to answer the questions directed to him and upon this mandate he acquired, and was expressly given by the Grand Jury, an immunity co-extensive with the operational effect of New York law. (Penal Law, §2447; Cf. *People* v. *De Feo*, 308 N. Y. 595).

Petitioner thereupon asserted that although the statute regulating immunity in New York would protect him against prosecution in this State based on his testimony, answers elicited under compulsion of New York authority would incriminate him under Federal law which makes unlawful, among other things, the payment of money by an employer to any representative of his employees in an industry affecting commerce (29 U. S. C., §186). He thereupon persisted in refusal to answer the questions before the Grand Jury and was held in contempt by the Court of General Sessions.

This is an Article 78 proceeding against the judge presiding at the General Sessions at which petitioner was held in contempt and against the District Attorney of New York County in the nature of prohibition. The amended answer pleads matters largely in the nature of defenses of law; and a reply served by the petitioner contains an affirmative pleading that the "reality of petitioner's danger of self-incrimination" under provisions of the Federal Labor Management Relations Act is based on the public

announcement of the United States Attorney of the Southern District of New York of an intention "to cooperate with the District Attorney of New York County in the prosecution of criminal cases in the field of the subject matter out of which petitioner's commitment arose". This reply further alleges that the respondent District Attorney "intends to cooperate with" the United States Attorney "in the prosecution of such criminal cases in the courts of the United States".

Since the court at Special Term disposed of these issues summarily without trial and by a dismissal of the petition which carried with it a dismissal of the reply as being insufficient, we are required to accept as true upon this appeal the factual allegations of the reply in respect of the cooperation between Federal and State prosecuting officers in this area of criminal responsibility occupied both by Federal and State governments within their respective statutory enactments. (*Matter of Doherty* v. *McElligott*, 258 App. Div. 257, 258, 260).

We therefore are required to begin the consideration of the question raised by the petitioner by accepting as a demonstrated fact in the record before us the actual cooperative policy between the appropriate Federal and State authorities in prosecuting crimes arising from acts made criminal both by Congress and by the New York Legislature and concerning which the petitioner's testimony is sought to be compelled.

If the literal logic of some of the decided cases be carried to the ultimate it would seemingly be quite possible for a State prosecuting authority to obtain a direction to compel a witness to incriminate himself upon granting a State immunity and for this to be followed by a Federal prosecution for the act disclosed under compulsion; and, indeed, with the compelled testimony used in support of the Federal charge.

But the full implications of such a concave view of constitutional privilege have not been faced, and the cases which have called up discussion of the question have not required that this ultimate question be decided. In the

margin of decision the view sometimes has been expressed that the possibility of Federal prosecution upon the compelled State disclosure has been remote or unlikely.

The complex and delicately adjusted balance of sovereignties between Federal and State governments presupposes a related measure of responsibility for each. Each is bound by identical constitutional restraints. The State has its function under the United States Constitution as well as the Federal government; and they have extremely close and continuous relations with each other. We are not here treating of sovereign strangers but of inseparable sovereigns of the same fibre and substance.

The cases of different sovereign jurisdictions decided under English law and sometimes cited in American cases on this subject, seem to us to have only illustrative or peripheral relation to the precise American constitutional problem of what ought to happen when a State compels criminal self-incrimination in an area of actual exposure of the witness to prosecution under effective and operative Federal criminal law. Examples of the often cited English cases which hold the British court will not protect witnesses against violation of the law of "another country" are *King of the Two Sicilies* v. *Willcox* (7 State Trials, N. S. 1050, 1068; *Queen* v. *Boyes* (1 B. & S. 311, 330). (*Cf. United States* v. *Murdock*, 284 U. S. 141, 149).

The States of the United States certainly are not "other countries" in relation to the Federal government. Federalism as we have developed it does not exist in airtight compartments of sovereign power; both general and state governments spread together over the same land and embrace the same people.

The whole tenor of constitutional law as developed in the courts of the United States suggests that a witness compelled by a State to testify against himself in a criminal case also affected by Federal law, where the Federal prosecuting authorities have knowledge of the State proceedings, and especially where they cooperate in those proceedings, will be protected fully by the judicial power of the

United States against the adverse effects of such compulsion on subsequent Federal prosecution.

The usual rule is, of course, that the United States will not deem itself bound not to prosecute because of unilateral exercise of compulsion to self-incrimination by a State; and this in part on the ground that the general government will not be restrained in its policy by local action taken by a State government. The principle is illustrated in *Feldman* v. *United States* (322 U. S. 487) in which Mr. Justice Frankfurter noted that "a State cannot by operating within its constitutional powers restrict the operations of the National Government within its sphere" (p. 490). See also *Jack* v. *Kansas* (199 U. S. 372, 380).

But in some of the decisions on the subject which preceded *Feldman* v. *United States* the court regarded the risk of Federal prosecution arising from State compulsion as distant and remote; and this conception is in the overtone of the opinions as suggesting by mere remoteness a safeguard enough for the case actually presented. In *Jack* v. *Kansas*, for example, in dealing with an argument in objection to a State immunity statute that it did not protect against Federal prosecution in the same field, Mr. Justice Peckham agreed with the Supreme Court of Kansas that the danger that Federal prosecution "would ever take place" was "so unsubstantial and remote" that it was unnecessary, and of course not possible, for the State to provide against it.

"We do not believe that in such case there is any real danger of a Federal prosecution, or that such evidence would be availed of by the government for such purpose" (p. 382). In dealing with the inability of the State to prevent prosecution of the same party for a Federal violation the court interpolated the comment "if it could be imagined that such prosecution would be instituted in such circumstances" (p. 380).

In dealing with its own immunity statutes, the United States has been able to give a simple and summary answer to the assertion that Federal immunity does not safeguard the witness against State prosecution based on his testi-

mony. The supremacy of the general government is asserted. (*United States* v. *Murdock, supra; Hale* v. *Henkel*, 201 U. S. 43). The converse problem posed by the inability of a State to assure immunity against Federal prosecution is at once more subtle and more difficult of adequate solution which would seem to hang some measure of cooperation, administrative or judicial, between the two governments.

The opinion in *Feldman* v. *United States* makes it clear that the complete non-participation of Federal authorities in the private proceedings in the New York State court which elicited the incriminating testimony was an important element which led to the permitted use of such testimony in the United States court.

If a Federal agency "were to use a State court as an instrument for compelling disclosures for federal purposes" the policy of the courts of the United States would be to protect the witness "against such an evasive disregard of the privilege against self-incrimination" (p. 494). Moreover, the court was of opinion that there was "no complicity" between private parties obtaining the incriminatory testimony in the State court "and federal law-enforcing officers" (p. 492).

Although some of the restraints imposed by the first eight amendments of the Constitution of the United States on the Federal government have now an impact upon the States by virtue of the reflected due process and equal protection requirements of the Fourteenth Amendment (*Board of Education* v. *Barnette* (319 U. S. 624)), it is an interesting commentary on constitutional development in the United States that the prohibition on self-incrimination in the Fifth Amendment is not by mirrored force of the Fourteenth Amendment held to be binding on the States. (*Adamson* v. *California*, 332 U. S. 46; *Palko* v. *Connecticut*, 302 U. S. 31; *Twining* v. *New Jersey*, 211 U. S. 78); although the historically closely related protection against the effect of a confession elicited by extra-judicial force is protected by the Fourteenth Amendment (*Lee* v. *Mississippi*, 332 U. S. 742).

But although the Fourteenth Amendment also does not operate to prevent, for example, unreasonable searches and seizures by a State government (*Wolf* v. *Colorado*, 338 U. S. 25) nevertheless the active participation of officers of the United States in a state-initiated search and seizure will effectively bar the reception of such evidence in the Federal courts within the operative effect of the United States Constitution (*Byars* v. *United States*, 273 U. S. 28).

"We cannot avoid the conclusion," said Mr. Justice Sutherland, "that the participation of the agent in the search was under color of his federal office and that the search in substance and effect was a joint operation of local and federal officers" (p. 33). The Federal government has the right to use evidence improperly seized by State officers "operating entirely on their own account," but the "rule is otherwise when the Federal government * * * participates" in the wrongful seizure.

It is not difficult from this to analogize joint cooperation of State and Federal authorities, or the participation of Federal authorities by cooperation with State officers, in elicitation of compulsory incriminating testimony so that it will result in the protection of the Fifth Amendment in a subsequent criminal prosecution based on such testimony. In *Burdeau* v. *McDowell* (256 U. S. 465) which considered the effect of both the Fourth and Fifth Amendments on papers seized, the court was careful to note that "no official of the Federal government had anything to do with" the taking of the property in question (p. 475).

While the restraint of the Fifth Amendment does not directly touch our judicial processes, we in New York have our own constitutional provision in the same spirit and in the same language (N. Y. Const., Art. I, 6), and we are bound as far as our strength permits to give it effect.

We are not able to assure protection against a Federal prosecution using the self-incriminatory testimony we compel against objection and for which we give a State immunity, and the validity of our immunity statute does not depend on our ability to secure the witness against Federal prosecution (*Dunham* v. *Ottinger*, 243 N. Y. 423).

But we cannot in fair compliance with our own Constitution remain insensible to the actual dangers of non-immunized compulsory incrimination in the United States courts where we compel testimony in the ever-broadening areas and in subjects affected by the criminal laws of both governments. And while we can exercise no control over Federal practice, we can exercise a judicial supervision over State enforcement officers.

A State prosecuting officer investigating an area in which the criminal laws of both the Federal and State governments operate together, and requiring immunized testimony in the development of his case, could himself give adequacy to State constitutional safeguards by tendering cooperation with the appropriate United States attorney.

If the cooperation were accepted by the Federal government we have no doubt that within *Feldman* v. *United States, Byars* v. *United States* and *Burdeau* v. *McDowell* (*supra*), the courts of the United States would afford adequate safeguards to the witness. Such safeguards would strengthen the confidence with which a State might undertake to compel self-incriminating testimony where duality of criminal law might be operative; and it would tend to assure the adequacy of State constitutional guaranties binding alike on State prosecutors and State courts.

When to seek such cooperation and when to proceed without it would, in the nature of things, rest in the conscience and judgment of the district attorney, who would act in consonance with the spirit of the New York Constitution. The solution, at bottom, lies in cooperation in good faith between the two governments and their judicial and prosecuting establishments, both of which live in quite the same tradition.

Assuming, as we do in this case, from the undisputed allegation of the public announcement of cooperation by the United States attorney with the district attorney, and the undisputed allegation of intention by the district attorney to cooperate with the United States attorney, that the fact of cooperation is true and that the instant inquiry is

embraced within it, adequate protection under the Federal decisions would have inured to the petitioner.

The United States courts would not, of course, accept these pleadings as conclusive; but if Federal judicial inquiry disclosed the facts to be as they are here pleaded, the immunity that petitioner would gain under New York law would seem to extend to the residual risk of Federal prosecution. On the other hand, if it is not shown that the alleged cooperation and intent to cooperate did in fact exist, it would not appear that there is a real and substantial danger that the testimony compelled by the state will be used in a subsequent Federal prosecution.

The order should be affirmed without costs.

All concur.

Decision Amending Remittitur.

COURT OF APPEALS.

April 4, 1957.

Motion to amend remittitur granted. Return of remittitur requested and, when returned, it will be amended by adding thereto the following:

Upon the appeal herein there were presented and necessarily passed upon by the Court of Appeals questions under the Constitution of the United States, as follows: "1. In the course of an investigation by the Third April Grand Jury of New York County under Penal Law, Sections 380, 580 and 850 dealing with bribery of labor union representatives, conspiracy and extortion, appellant, an employer engaged in interstate commerce, declined to answer questions directed to the ascertainment of whether he had paid money to certain named officials of a labor union, Local 239, International Brotherhood of Teamsters, on the ground that the answers would tend to incriminate

him, citing particularly his peril under a Federal statute, Taft-Hartley Act, Section 302, 29 U. S. C. 186 regulating under penal sanction, payments to union representatives; and appellant was thereupon convicted of a contempt of the Court of General Sessions of said County against his contention that since the source of the peril of prosecution was Federal, he was privileged to decline to answer by virtue of the Fifth Amendment to the United States Constitution which binds the State Court Grand Jury through the Supremacy clause Article VI, Clause 2 as well as through the Privileges and Immunities Clause of the Fourteenth Amendment. This Court decided the stated contention adversely to appellant.

2. In the course of an investigation by the Third April Grand Jury of New York County proceeding under Penal Law, Sections 380, 580 and 850 dealing with bribery of labor union representatives, conspiracy and extortion, appellant, an employer engaged in interstate commerce, declined to answer questions directed to the ascertainment of whether he had paid money to certain named officials of a labor union, Local 239, International Brotherhood of Teamsters; and appellant was thereupon convicted of a contempt of the Court of General Sessions of said County against his contention that Taft-Hartley Act, Section 302, 29 U. S. C. 186, regulating payments by employers to labor union repsentatives, by preempting the field of regulations of such payments had rendered Penal Law Sections 380, 580, and 850, insofar as applied to industries affecting Commerce, repugnant to the Commerce (Article 1, Section 8) and Supremacy (Article VI Clause 2) Clauses of the United States Constitution and hence deprived the State Grand Jury of jurisdiction to make the stated inquiries. This Court decided the stated contention adversely to appellant."

APPENDIX B.

Statutes Involved.

A. Federal Statutes.

1. Labor Management Relations Act 1947 (Taft-Hartley Act) Sec. 302. 29 U. S. C. §186; 61 Stat. §157.

RESTRICTIONS ON PAYMENTS TO EMPLOYEE REPRESENTATIVES

SEC. 302. (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

(c) The provisions of this section shall not be applicable (1) with respect to any money or other thing of value payable by an employer to any representative who is an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not

be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; or (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in the event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other place as may be designated in such written agreement; and (C) such payments as are intended to be used

for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities.

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) The District courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 17 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., title 28, sec. 381), to restrain violations of this section, without regard to the provisions of sections 6 and 20 of such Act of October 15, 1914, as amended (U. S. C., title 15, sec. 17, and title 29, sec. 52); and the provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", approved March 23, 1932 (U. S. C., title 29, secs. 101-115).

(f) This section shall not apply to any contract in force on the date of enactment of this Act, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c) (5) (B) upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c) (5) (A) be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

2. Constitution, Art. I, Section 8, Cl. 3.

"The Congress shall have Power . . .
To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

3. Constitution, Art. VI, Cl. 2.

"This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding."

4. Constitution, Amendment V.

"No person . . . shall be compelled in any criminal case to be a witness against himself, . . ."

5. Constitution, Amendment XIV, Section 1.

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . .

B. New York State Statutes.

6. New York Penal Law, Section 380.

"1. A person who gives or offers to give any money, property or other thing of value to any duly appointed representative of a labor organization with the intent to influence him in respect to any of his acts, decisions, or other duties as such representative, or to induce him to prevent or cause a strike by the employees of any person or corporation, is guilty of a misdemeanor.

2. Any duly appointed representative of a labor organization who solicits or accepts or agrees to accept from any person any money, property or other thing of value upon any agreement or understanding, express or implied, that he shall be influenced in respect to any of his acts, decisions, or other duties

as such representative, or upon any agreement or understanding, express or implied, that he shall refrain from causing or shall prevent a strike or work stoppage or any form of injury to any business, is guilty of a misdemeanor."*

3. (Grant of immunity.)

7. New York Penal Law, Section 850.

Extortion is the obtaining of property from another, or obtaining the property of a corporation from an officer, agent or employee thereof, with his consent, induced by a wrongful use of force or fear, or under color of official right.

8. New York Penal Law, Section 580.

"If two or more persons conspire:

1. To commit a crime; or

2-6. . . .

Each of them is guilty of a misdemeanor."

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* An amendment of this subdivision effective September 1, 1956 extended to coverage to welfare fund trustees or representatives.

APPENDIX C.

Order Appealed from (Remittitur) with Amending Order.

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 8th day of March in the year of our Lord one thousand nine hundred and fifty-seven, before the Judges of said Court.

WITNESS,

The Hon. ALBERT CONWAY,
Chief Judge, Presiding.

RAYMOND J. CANNON,
Clerk.

Remittitur March 8, 1957.

No. 363.

IN THE MATTER
of
The Application of MILTON KNAPP,
Appellant,
for an Order &c.,
vs.
MITCHELL D. SCHWEITZER, Judge of the Court of General Sessions, & ano., &c.,
Respondents.

BE IT REMEMBERED, That on the 12th day of December in the year of our Lord one thousand nine hundred and

fifty-six, Milton Knapp, the appellant in this cause, came here unto the Court of Appeals, by William J. Keating, and Butler, Bennett, Fitzpatrick & DeSio, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Mitchell D. Schweitzer, Judge of the Court of General Sessions, & ano., &c., the respondents in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Bernard H. Fitzpatrick, of counsel for the appellant and by Mr. Albert P. Loening, Jr., of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, March 8, 1957.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON,
Clerk.

[SEAL]

STATE OF NEW YORK

IN

COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the fourth day of April A. D. 1957.

PRESENT,

Hon. Albert Conway,
Chief Judge, presiding.

Mo. No. 154.

IN THE MATTER

of

The Application of MILTON KNAPP,
Appellant,

for an Order &c.,

vs.

MITCHELL D. SCHWEITZER, Judge of the Court of General Sessions, & ano., &c.,
Respondents.

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted. Return of remittitur requested and, when returned, it will be amended by adding thereto the following:

Upon the appeal herein there were presented and necessarily passed upon by the Court of Appeals questions under the Constitution of the United States, as follows: "1. In the course of an investigation by the Third April Grand Jury of New York County under Penal Law, Sections 380, 580 and 850 dealing with bribery of labor union representatives, conspiracy and extortion, appellant, an employer engaged in interstate commerce, declined to answer questions directed to the ascertainment of whether he had paid money to certain named officials of a labor union, Local 239, International Brotherhood of Teamsters, on the ground that the answers would tend to incriminate him, citing particularly his peril under a Federal statute, Taft-Hartley Act, Section 302, 29 USC 186 regulating under penal sanction, payments to union representatives; and appellant was thereupon convicted of a contempt of the Court of General Sessions of said County against his contention that since the source of the peril of prosecution was Federal, he was privileged to decline to answer by virtue of the Fifth Amendment to the United States Constitution which binds the State Court Grand Jury through the Supremacy clause Article VI, Clause 2 as well as through the Privileges and Immunities Clause of the Fourteenth Amendment. This Court decided the stated contention adversely to appellant. 2. In the course of an investigation by the Third April Grand Jury of New York County proceeding under Penal Law, Sections 380, 580 and 850 dealing with bribery of labor union representatives, conspiracy and extortion, appellant, an employer engaged in interstate commerce, declined to answer questions directed to the ascertainment of whether he had paid money to certain

named officials of a labor union, Local 239, International Brotherhood of Teamsters; and appellant was thereupon convicted of a contempt of the Court of General Sessions of said County against his contention that Taft-Hartley Act, Section 302, 29 USC 186, regulating payments by employers to labor union representatives, by preempting the field of regulations of such payments had rendered Penal Law Sections 380, 580 and 850, insofar as applied to industries affecting Commerce, repugnant to the Commerce (Article 1 Section 8) and Supremacy (Article VI Clause 2) Clauses of the United States Constitution and hence deprived the State Grand Jury of jurisdiction to make the stated inquiries. This Court decided the stated contention adversely to appellant."

And the Supreme Court, New York County, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

GEARON KIMBALL
Deputy Clerk

(SEAL)